

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

December 18, 2002 Session

CLOIS JUNIOR CLARK v. PETERBILT MOTOR COMPANY

**Direct Appeal from the Circuit Court for Sumner County
No. 21270-C C. L. Rogers, Judge**

**No. M2002-00452-WC-R3-CV - Mailed - April 1, 2003
May 5, 2003**

The plaintiff filed this compensation complaint in which he alleged he sustained injury to both arms as a result of continuing repetitive use thereof while working as a welder for the plaintiff. The trial judge found in favor of the plaintiff and awarded him temporary total disability benefits and found he had sustained a 30 percent permanent partial impairment to both arms. The defendant contends the trial judge erred in finding the plaintiff's medical problems arose out of and in the course of his employment and that the award of 30 percent impairment to each arm was excessive. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JOE C. LOSER, JR., SP. J., joined.

Terry L. Hill and Stacey Billingsley Cason, Nashville, Tennessee, for the appellant, Peterbilt Motor Company.

William Joseph Butler, Lafayette, Tennessee, for the appellee, Cloise Junior Clark.

MEMORANDUM OPINION

At the time of trial, the plaintiff was fifty-two years of age. He had a ninth grade education, a GED, and vocational training as a welder. He was married and is the father of one child.

The plaintiff began working for the defendant in 1983. Prior to his medical problems, he was welding truck axles, which required extensive use of his arms. In early 2000, the plaintiff began to develop numbness in his arms. The plaintiff was ultimately seen by Dr. David Schmidt, an orthopedic surgeon. Dr. Schmidt diagnosed bilateral cubital tunnel syndrome, which is entrapment of the ulnar nerve at the elbow. Dr. Schmidt saw the plaintiff for some time and after the plaintiff did not respond fully to conservative treatment, Dr. Schmidt recommended surgery.

After recommending surgery, Dr. Schmidt reviewed a video tape of the work done by the plaintiff and concluded the work was not the cause of the injury. The defendant denied coverage at this time and the plaintiff sought other medical care.

Dr. Robert Landsberg, an orthopedic surgeon, first saw the plaintiff on December 28, 2000. His diagnosis was the same as Dr. Schmidt's. Dr. Landsberg concluded that surgery was indicated for treatment of the plaintiff. He performed surgery on the left elbow on January 12, 2001 and on the right elbow on February 16, 2001. Dr. Landsberg released the plaintiff on April 10, 2001, to return to work without restrictions. He testified that he did not want to release the plaintiff without restrictions but this was the only way the plaintiff could return to work for the defendant.

Dr. Landsberg testified the plaintiff reached maximum medical recovery on June 19, 2001, with a 5 percent medical impairment to both arms. He placed restrictions of no prolonged repetitive flexing and extension of the arms and no repetitive heavy lifting.

Dr. Landsberg reviewed the video tape and was of the opinion that it depicted work which would cause the plaintiff's injury.

The plaintiff and a co-worker testified the video tape was not an accurate rendition of the amount of work done daily on the production line because the video was shot on a day when the line was closed down a considerable part of the day because of problems. The trial judge believed the testimony of the two witnesses on this and found that the video was inaccurate.

This case presents the usual duel between competing witnesses. On the plaintiff's side is the testimony of the plaintiff and Dr. Landsberg, that the plaintiff's ulnar nerve problem was caused by the work he did over the years for the defendant. On the defendant's side is the testimony of Dr. Schmidt, who testified the work which the plaintiff performed was not the cause of the injury. Dr. Schmidt's testimony was, for the most part, based upon a video tape depiction of the work which was discredited by the trial judge upon the basis of the testimony of live witnesses.

In determining where the preponderance of the evidence lies, we give great deference to the finding of the trial judge when the finding is based upon witnesses whom the trial judge has seen and heard. Humphrey v. David Witherspoon, inc., 735 S.W.2d 315 (Tenn. 1987). Beyond this, in weighing the medical evidence, the trial judge may accept the opinion of one expert over that of another, Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996), and although we may make an independent assessment of medical evidence presented by deposition as it is in this case, Cooper

v. INA, 884 S.W.2d 446 (Tenn. 1994), we find no reason to disagree with the conclusion reached by the trial judge in this case.

The defendant contends the award of 30 percent loss of use of the plaintiff's arms is excessive because of the lack of evidence showing vocational impairment as a result of the injuries. A worker does not have to show vocational disability or loss of earning capacity to be entitled to benefits for the loss of use of a scheduled member. Duncan v. Boeing Tennessee, Inc., 825 S.W.2d 416 (Tenn. 1992). The defendant is not entitled to relief on this basis.

The judgment of the trial court is affirmed and the cost of this appeal is taxed to the defendant.

JOHN K. BYERS, SENIOR JUDGE

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL

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**Circuit Court for Sumner County
No. 21270-C**

No. M2002-00452-WC-R3-CV - Filed - May 5, 2003

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the defendant, Peterbilt Motor Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM